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FILED

JAN - 8 2015

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 In Re:

Case No.: 14-31532 HLB 11

12 KINGSWAY CAPITAL PARTNERS,
13 LLC,

14 Debtor.

Date of Hearing: February 19, 2015
Time: 2:00 p.m.
Location: 235 Pine St., 23rd Fl.
San Francisco, CA

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18 **MARIA SOSA'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM**
19 **AUTOMATIC STAY**

20 **[SUPPORTING DECLARATION OF MARIA**
21 **SOSA FILED SEPARATELY]**

INTRODUCTION

Maria Sosa, the movant in the above-captioned case (“Movant”), respectfully submits her Brief in Support of Motion for Relief from Automatic Stay (the “Motion”). Pursuant to 11 U.S.C. § 362(d), Movant seeks relief from the automatic stay so she may be allowed to proceed to exercise her rights under applicable nonbankruptcy law with respect to the real property located at 2148 University Avenue, East Palo Alto, California 94303 (the “Subject Property”). This Brief responds to the Courts order of December 8, 2014, instructing the parties to address whether the lease at issue terminated by operation of law.

The question of whether a bankruptcy trustee or debtor in possession may assume or reject a lease is one that requires a two prong analysis. The first prong, which the Court specifically identified for briefing, is whether the lease at issue terminated prior to Debtor filing for bankruptcy protection. If the Court determines that the lease in fact terminated by operation of law, the second prong of the analysis considers whether the lease should be resurrected pursuant to California’s anti-forfeiture statutes. This second step “permits the debtor-in-possession the same opportunities to avoid forfeiture of a lease or executory contract that it would have received under state law absent the bankruptcy proceedings.” (*City of Valdez v. Waterkist Corp. (In re Waterkist Corp.)*, 775 F.2d 1089, 1091 (9th Cir., 1985).) The burden of proof as to both prongs of the test is on Debtor. (11 U.S.C. § 362(g) (West 1979 & 1988 Supp.).)

ARGUMENT AND AUTHORITIES

1. The Lease Terminated by Operation of Law Prior to Debtor Filing the Underlying Petition for Bankruptcy.

The Bankruptcy Code permits a trustee, with court approval, to “assume or reject any executory contract or unexpired lease of the debtor.” (11 U.S.C. § 365(a).) However, “[t]he trustee may not assume...any executory contract or unexpired lease of the debtor...if...such lease is nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.” (*Vanerpark Props. v. Buchbinder (In re Windmill Farms, Inc.)* 841 F.2d 1467, 1472 (9th Cir., 1988); *Waterkist*, 775 F.2d at 1091; 11 U.S.C. § 365(c)(3).) The phrase

1 “applicable nonbankruptcy law” means applicable state law. (*Waterkist*, 775 F.2d at 1091; *In re*
2 *Beck*, 5 B.R. 169, 171 (Bankr. D. Haw. 1980) (debtor could not assume beauty salon license that
3 licensor terminated prepetition under nonbankruptcy law).) Simply put, if a lease of
4 nonresidential real property has been terminated before the filing of a bankruptcy petition, there is
5 nothing left for the trustee to assume. (*Windmill Farms*, 841 F.2d at 1469; *See Kearny Mesa*
6 *Crossroads v. Acorn Investments (In re Acorn Investments)*, 8 B.R. 506, 510 (Bankr. S.D. Cal.
7 1981).)

8 In the context of a nonresidential lease, at least one district court has held that the filing of
9 a complaint for unlawful detainer terminates the lease for purposes of preventing it from being an
10 executory contract, which can be assumed in bankruptcy. (*See In re Escondido W. Travelodge*,
11 52 B.R. 376 (S.D. Cal. 1985).) In *Escondido*, the court noted that cause exists to lift the automatic
12 stay if the lease cannot be assumed, and the termination under California landlord-tenant law
13 occurs when a landlord, after complying with the appropriate notice, files an unlawful detainer
14 action in state court. Although the court recognized that mere filing is not a formal adjudication
15 of the validity of the termination, it reasoned that relief from stay was nonetheless appropriate, to
16 allow the validity of the termination to be litigated in the state court forum under state law.
17 (*Escondido*, 52 B.R. at 382.)

18 The United States Court of Appeals for the Ninth Circuit has also interpreted
19 California law as to whether a tenant retains any property interest once a lease has been
20 terminated. In the case of *Windmill Farms*, the Ninth Circuit held that a lease of real property is
21 terminated under California law when the lessor affirms his election to terminate the lease as
22 expressed in a notice to pay rent or quit which the lessor has previously served on the lessee.
23 (*Windmill Farms*, 841 F.2d at 1469-71.) This affirmation of the termination of the lease by lessor
24 is usually accomplished by the filing of the complaint for unlawful detainer. (*In re Smith*, 105
25 B.R. 50, 53-54 (Bankr. C.D. Cal. 1989).) Thus, if a lessor properly notifies the lessee of the
26 lessor’s intention to terminate the lease, the unpaid rent is not paid within the appropriate period
27 of notice, and the lessor affirms his intention to terminate the lease by, at least, filing a complaint
28 for unlawful detainer, the lease is terminated and the lessee retains no property interest with

1 regards to the leased real property. (*Id.* at 54.) If the lessor stated a forfeiture election in his
2 notice to the lessee, the lessor is also entitled to a judicial declaration of forfeiture of the lease.
3 (*Windmill Farms* 841 F.2d at 1470.)

4 In arriving at its conclusion, The *Windmill Farms* Court thoroughly analyzed California
5 Civil Code section 1951.2(a), which provides that “if [the lessee’s] right to possession is
6 terminated by the lessor because of breach of the lease, the lease terminates.” (Cal. Civ. Code §
7 1951.2(a).) It also examined California’s unlawful detainer statutes, such as California Code of
8 Civil Procedure section 1161 and determined that a tenant who is guilty of an unlawful detainer
9 cannot possibly have the right to possession of the property when notice is properly provided.
10 That is, possession would be unlawful after the three-days’ notice period has expired. (*Windmill*
11 *Farms*, 841 F.2d at 1969.) “In an ensuing unlawful detainer proceeding, the court does not decide
12 whether the lessor terminated the lease. That has already occurred. Instead, the court decides
13 whether the termination was proper and if it was, the court grants the lessor a judgment for
14 possession of the property.” (*Id.*)

15 In the instant case, the Subject Property is commercial property and therefore falls within
16 the ambit of 11 U.S.C. § 365(c)(3). Moreover, Movant prudently complied with the notice
17 requirements under the lease and California Civil Code sections 1161 to 1161.5. (Sosa Decl., ¶ 4-
18 5.) Debtor stopped paying rent to Movant in or about May 2014. Thereafter, Movant spoke to
19 Debtor on multiple occasions to demand payment. (Sosa Decl., ¶ 4.) On or about June 2, 2014,
20 Movant provided Debtor with written notice of the default, demanding that Debtor cure the
21 default by June 17, 2014 or Movant would proceed with legal action. (Sosa Decl., ¶ 4.) Debtor,
22 however, did not respond to these repeated demands.

23 On or about July 1, 2014, Movant served Debtor with a 3-Day Notice to Pay Rent or
24 Vacate (the “Notice”). (Sosa Decl., ¶ 5). The Notice explicitly provided that unless Debtor cure
25 the default by July 4, 2014, Movant would file an unlawful detainer action and declare a
26 forfeiture of the lease. It is uncontroverted that Debtor refused pay rent. Consequently, Movant
27 filed an unlawful detainer action against Debtor on July 8, 2014 in San Mateo County Superior
28 Court. (Sosa Decl., ¶ 6.) To date, Debtor has made no attempt to cure the default and has done

1 everything in its power to stall the eviction process.

2 Movant has complied with all that is required under the law to effect the termination the
3 lease. Based on the foregoing, the leasehold interest terminated prior to Debtor filing for
4 bankruptcy, which constitutes “cause” within the meaning of 11 U.S.C. § 362(d) to terminate
5 stay.

6 **2. Kingsway Capital Parters, LLC Is Not Entitled to Relief from Forfeiture of the**
7 **Lease.**

8 The Ninth Circuit Court, in *Windmill Farms* left unanswered the question of whether
9 relief from forfeiture was available to a party seeking to assume a lease in bankruptcy. As a
10 general rule, the filing of the bankruptcy petition does not resurrect a lease, and the bankruptcy
11 court does not have the power to resurrect a lease which was properly terminated under state law
12 prior to filing of the bankruptcy petition. (*Waterkist Corp.*, 775 F.2d at 1091; *In re 1345 Main*
13 *Partners, Ltd.*, 215 B.R. 536, 541 (Bankr. S.D. Ohio 1997).) If the lease has terminated and the
14 debtor moves to assume the lease, an inquiry must be made as to whether the termination could
15 have been reversed under any applicable state law anti-forfeiture provision. (*Windmill Farms*,
16 841 F.2d at 1471-72.)

17 Code of Civil Procedure section 1179 provides the exclusive procedure for obtaining
18 relief from an unlawful detainer forfeiture of a rental. (*Boston Properties v. Pirelli Tire Corp.*
19 (1982) 134 Cal.App.3d 985; see also *Wilson v. Bill Barry Enterprise*, 822 F.2d 859 (9th Cir.,
20 1987).) The Code provides, in pertinent part, that “[t]he court may relieve a tenant against a
21 forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy
22 has terminated, and restore him or her to his or her former estate or tenancy, in case of
23 hardship...” (Cal. Civ. Code § 1179.) The court must “take into consideration the circumstances
24 of the case, the hardship, if any, to the lessee from the forfeiture, the hardship, if any, to the lessor
25 from relieving the lessee from the forfeiture, the willful or other character of the breach, and then
26 use its best discretion in determining whether relief will be granted.” (*Thrifty Oil Co. v. Batarsee*
27 (1985) 174 Cal.App.3d 770, 777 (quoting *Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 70–71).)
28 Importantly, a finding of hardship that would result from forfeiture does not automatically require

1 the court to grant relief. (*Olympic Auditorium, Inc. v. Superior Court* (1927) 81 Cal. 283.)

2 Relief from forfeiture of the lease will in no way place the Movant in a position as if the
3 breach had not occurred. It will essentially force Movant to continue a landlord-tenant
4 relationship with Debtor, while Debtor continues to beleaguer Movant with demands of millions
5 of dollars, conjointly with litigation seeking the same.¹ Certainly, a continuing landlord-tenant
6 relationship would only serve to foster further resentment by both parties and aggravate an
7 already toxic relationship.

8 Movant's hardship would not end there. Movant has been desperately trying to finalize
9 the sale of her commercial property in which Debtor is a tenant. (Declaration of Maria Sosa
10 (Sosa Decl.) ¶ 9-10.) Movant needs to sell her property because she no longer has the energy or
11 financial resources to sustain ownership. She has very little income and survives primarily on
12 social security. She simply cannot afford to continue owning the commercial property. (Sosa
13 Decl., ¶ 9.)

14 What is more, Debtor's continued possession of the Subject Property would make it
15 nearly impossible to sell the commercial property, as no potential buyer would be willing to buy
16 into a lawsuit. Debtor's CEO, Nathaniel Basola Sobayo ("Sobayo"), already filed a lawsuit
17 against everyone involved in the pending sale, including the proposed buyer and the realtors.
18 There is no reason to believe that Sobayo wouldn't file a lawsuit against the next proposed buyer.
19 In fact, Sobayo has filed no fewer than ten (10) lawsuits in the United States District Court,
20 Northern District of California, and mostly involving property.² He's certainly sophisticated in
21 that respect.

22 Movant, as a seller, has a duty to disclose known facts which materially affect the value or
23 desirability of her property. Arguably, pending litigation involving the property and a litigious
24 tenant affect the value and desirability of the property. Suffice it to say, Movant's hardship
25 resulting from relief from forfeiture would be severe, if not immeasurable.

26 ¹ On September 5, 2014, Nathaniel Basola Sobayo sued Maria Sosa in state court seeking damages in the amount of
27 \$1,650,000. (San Mateo County Superior Court Case No. CIV530289). Thereafter, on November 14, 2014,
Nathaniel Basola Sobayo filed an adversary action against Maria Sosa, seeking damages in the amount of \$5 million.

28 ² Debtor's filings in Federal Court involve the following known cases: 5:09-cv-01436-JW; 5:09-cv-03388-JW;
5:09-cv-03961-JW; 5:09-cv-04911-JW; 3:11-cv-00734-JSW; 3:10-cv-03941-WHA; 4:11-cv-00701-SBA;
4:11-cv-03850-CW; 4:12-cv-05263-SBA; and 3:13-cv-01804-SI.

1 In contrast, with the exception of having to pack and move, it's hard to imagine what
2 hardships Debtor would suffer if it is forced to vacate the Subject Property. Movant did not
3 expend monies in construction or fixtures to the Subject Property after taking possession and
4 would therefore suffer no prejudice from not being able to recoup those types of expenses. (Sosa
5 Decl., ¶ 3.) What is more, the Subject Property is not necessary for Debtor's continued existence
6 an automobile rentals business, as Debtor could easily rent another space and continue the same
7 operation. Ostensibly, the only hardship Debtor could face is the burden of relocation.

8 Debtor's breach was not a trivial one. It willfully and insolently refused to pay rent,
9 blaming Movant for supposed property damage that it suffered following a rainstorm. Debtor
10 was informed on multiple occasions that, with respect to a commercial lease, a landlords covenant
11 to repair and a tenant's covenant to pay rent are not dependent on one another. (Sosa Decl., ¶ 4.)
12 That is, the duty to pay rent continues ... notwithstanding the landlord's substantial interference
13 with the tenant's use and possession. (*Petroleum Collections Inc. v. Swords* (1975) 48
14 Cal.App.3d 841; *See also Custom Parking, Inc. v. Superior Court* (1982) 138 Cal.App.3d 90, 99.)
15 Simply put, Debtor's refusal to pay rent was in bad faith.

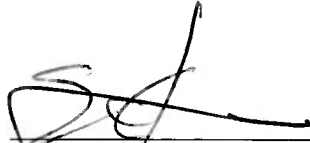
16 Debtor will undoubtedly make reference to the familiar principles that forfeitures are
17 abhorred. (*See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal. App. 3d 1033;
18 *see also Reed v. South Shore Foods, Inc.* (1964) 229 Cal. App. 2d 705, 713.) Any argument to
19 that effect must fall flat in light of the circumstances of this case. Debtor's failure to pay rent was
20 not based on its inability to pay. The situation was not one where Debtor fell on hard times and
21 simply could not afford the rent. Nor was the situation one where debtor mistakenly believed it
22 had the right to withhold rent. The circumstances of this case suggest far more bellicose conduct
23 on the part of Debtor – conduct that should bar anti-forfeiture relief. "He who seeks equity must
24 do equity." This maxim is not a moral persuasion but a fundamental maxim of equity
25 jurisprudence. (*See 2 Pomeroy, Equity Jurisprudence* (5th ed. 1941) § 385, pp. 51-53.) Debtor's
26 conduct does not warrant equitable relief, as it had plenty of opportunities to cure the default.
27 Instead, it chose to exhaust Movant with bullying and delay tactics. Accordingly, equity pursuant
28 to California Civil Code section 1179 should not be invoked and the lease should not be

1 reinstated.

2 **CONCLUSION**

3 Based on the forgoing, Movant respectfully request that her Motion for Relief from
4 Automatic Stay be granted.

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6 Date: January 7, 2015


SLAVIK S. LEYDIKER

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